STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

IN THE MATTER OF THE WAGE CLAIM OF THERESA M. LEWIS, Claimant, vs. THE KENSINGTON AGENCY, INC., a Montana corporation, Respondent.	)	Case No. 420-2005
	)	**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

I. INTRODUCTION

The hearing officer held an in-person hearing on the claimant's wage claim on May 26-27, 2005, in Missoula, Montana. The claimant Theresa M. Lewis participated on her own behalf. Deaydre Pulliam, vice-president, participated on behalf of the respondent corporation, The Kensington Agency, Inc. The hearing officer excluded witnesses on his own motion.

Theresa M. Lewis and Deaydre Pulliam testified. After hearing an explanation of the subject matter of the testimony of Charles Shonkwiler, a bank officer whose telephonic testimony was offered by the corporation, the hearing officer refused the witness, on relevance grounds. At the conclusion of testimony by both Lewis and Pulliam, the corporation asked that the hearing officer wait while a further witness, Claudia Kuznetsov, was contacted and brought to the hearing. Kuznetsov, another employee-officer of the corporation, had been present (outside the hearing room during testimony, inside the hearing room assisting Pulliam with documents and preparation during breaks in the hearing) periodically during the two days of hearing. The corporation had notice, and an admonition from the hearing officer during the afternoon testimony on May 27, that any additional witnesses needed to be immediately available when it came their time to testify. Nonetheless, the corporation failed to have Kuznetsov timely available to testify, and the hearing examiner refused the corporation's request and closed the testimonial record without Kuznetsov's testimony.

At the commencement of hearing, the hearing officer identified and adopted procedures to follow during testimony by Lewis and Pulliam (who could not reasonably ask themselves questions) and procedures to follow regarding potentially confidential information as to third parties. The hearing followed these procedures.

In accord with the hearing procedures and the agreement of the parties, the hearing officer admitted exhibits 1 through 10, without objection, subject to specified redactions after hearing. The hearing officer created an additional "sealed exhibit" listing the names of clients whose care Lewis provided during pertinent times. After hearing, the hearing officer received and admitted exhibit 11 (Lewis' W-2's).

Also after hearing, the hearing officer redacted the names of the clients and family members that appeared in exhibits 1, 2, 5, 7 and 9, as well as the names and information of employees other than Lewis that appeared in exhibits 3 and 8. The hearing officer also separated and sealed exhibit 8A (the multi-page client list) attached to the cover letter and redacted the employee pay list, which with the cover letter remains exhibit 8. Photocopies of the redacted exhibits are in the public record. With consent of the parties the hearing officer substituted photocopies of exhibits 4, 6, 7 and 9 for the original checks, pay reports and time slips provided at hearing, returning the originals to the parties. The hearing officer also added additional client names to the sealed exhibit, as those names appeared and were redacted in the various exhibits. A full set of exhibits (redacted or complete copies) is part of the public record, except for the sealed exhibit and exhibit 8A.

The corporation, after issuance of the confidentiality order, requested further redactions. The hearing officer denies that request as untimely. Unlike the redactions and sealings detailed in the previous paragraph, this request relates solely to confidentiality concerns of the corporation, which is a party and was actively participating in the hearing. The parties had ample chances to raise privacy and confidentiality concerns before exhibits were placed in the public record. The clients and other employees did not. The hearing officer encouraged and assisted the parties in identifying and addressing their privacy concerns in a timely manner. Having placed the balance of the exhibits in the public record without timely identification of matters as to which sealing is now sought because of party confidentiality concerns, the parties have made those documents public, and the hearing officer cannot now take their contents out of the existing public record.

At the close of hearing, the parties made oral arguments. The hearing officer left the record open for filing of exhibit 11. Upon its receipt and the issuance of the confidentiality order on June 6, 2005, the case was deemed submitted for decision.

II. ISSUE

The issue in this case is whether The Kensington Agency, Inc., owes wages to Theresa M. Lewis for work she performed, as alleged by her complaint.[1]

[1] The "Discussion" addresses exclusion of overtime or minimum wage claims.

III. FINDINGS OF FACT

1. Theresa M. Lewis was a personal care attendant, providing companionship services or respite care for individuals who, because of age or infirmity, were unable to care for themselves. She received wages for these services from The Kensington Agency, Inc., a Montana corporation, from April 2003 through August 2004, pursuant to agreements with the individuals and their families or legal guardians.

2. Lewis agreed that the corporation would pay her $90.00 for a 24-hour shift, $45.00 for a 12-hour shift and an hourly rate ($9.00 per hour for the pertinent work involved in this case) for shorter periods of work. The corporation paid her every 2 weeks. She was responsible to complete manual time cards, one weekly card for each client she served, showing what hours she had worked, on what dates, for what clients. The client, family member or legal guardian signed Lewis' completed card, to verify accuracy and to acknowledge the hours worked. Lewis sometimes submitted her time cards late, and sometimes did not complete them accurately. During the course of her employment, Lewis requested and received advances against her earnings. Neither Lewis nor the corporation ever completely reconciled their records for pay (including advances), hours worked and time card corrections. At hearing, neither party could state and prove simple totals of time worked and money paid. The corporation disclaimed the accuracy of the W-2s provided to Lewis for 2004, but has not sought to amend it. Lewis questioned the accuracy of the W-2s, but used them to file her tax returns, which she has not sought to amend.

3. On or about August 30, 2004, Lewis filed a wage claim against the corporation, claiming the corporation owed her $909.00 in unpaid wages. The basic claim apparently was "improper withholdings" from a single paycheck, according to some of Lewis's handwritten notes on the complaint.[2] While the claim was pending before the Wage and Hour Unit, Lewis amended her claim, asserting that the corporation owed her $936.38, for unpaid wages she earned from April 21, 2003 to August 25, 2004. At hearing, Lewis declined to specify the amount she sought, requesting a full review of the documents and testimony to determine how much the corporation owed to her, specifying that the time over which she alleged she was

[2] Lewis filled out the department's complaint form in long-hand, wrote on top, bottom and side margins and included attachments. At the top of the form, there is printed language stating, "The Department has authority to act on claims, such as: Non-payment of Wages; Non-Payment of Overtime, Improper Withholdings, Non-Payment of Prevailing Wages or Fringe Benefits, Non-Payment of Minimum Wage." Although this is informational rather than a question for the claimant to answer, Lewis underlined or circled all of the categories.

underpaid began on December 29, 2003 and ended on August 25, 2004. She also asserted minimum wage and overtime claims as one of the legal bases of her claims, after making no such express claims, as far as the hearing record reflects, from the time of complaint filing until the second day of hearing.

4. From the evidence presented of record, Lewis earned $10,467.75, for 97 days (24-hour shifts) at $90.00 per day, 25 halves (12-hour shifts) at $45.00 per half and 68.75 additional hours at $9.00 per hour.[3] The time cards are the best evidence of times Lewis worked. The corporation paid Lewis $11,624.22, as reflected in her W-2. Her W-2 is the best evidence of amounts paid to Lewis in 2004.[4]

5. As a result of a change in computer payroll processing, the corporation's pay-stubs reflected various hourly rates as well as day and half rates. These rates were generated by the computer programming, rather than an actual statement of the applicable pay rates.

6. Neither Lewis nor Pulliam was a particularly credible witness. Pulliam was unable to present an organized accounting of the corporation's records regarding Lewis' earnings and pay. Lewis denied every assertion of the corporation regarding pay that was not supported by specific documentation, while herself presenting scattered and sometimes inexplicable testimony regarding amounts earned and received. As a result, the documentary evidence, which is least subject to subjective interpretations and convenient recollections, provided the most reliable basis for determining the amounts Lewis earned and received.

IV. OPINION

Montana law requires employers to compensate employees for all hours worked. Mont. Code Ann. § 39-2-204(1). An employer may not employ any employee for a workweek longer than 40 hours unless the employee receives wages for

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[3] Table 1 to this decision specifies the facts from which these numbers are drawn.

[4] The parties agreed upon some wage payments made for the 18 pay periods involved, while disputing other wage payments. The agreed-upon payments totaled $8,034.41, while the disputed additional payments, because of the uncertainty about the number of advances and the total amount of the advances, cannot be added up to generate any reasonably certain amount. The corporation presented testimony that it paid wages owed to Lewis by checks made out to Lewis' husband at the time, Arthur A. Kostuk. There was no credible and substantial evidence establishing the total of any such payments, nor has the corporation made any amendments to Lewis' W-2 for any payments not previously reported. Thus, the W-2s, which neither party has sought to amend or otherwise alter by any filings with federal or state governments, are more reliable than the fragmentary and disputed evidence presented at hearing about wage payments either made to or received by Lewis.

work in excess of 40 hours in a workweek at a rate of not less than 1½ times the regular hourly wage rate. Mont. Code Ann. § 39-3-405(1). An employer may not employ any employee at an hourly rate of less than the applicable minimum wage. Mont. Code Ann. § 39-3-404(1). Overtime and minimum wage requirements do not apply to employees in domestic service employment who provide companionship services or respite care with the direct employer a family member or legal guardian of the person receiving the services or care. Mont. Code Ann. § 39-3-406(1)(p).

The statutory exclusions are affirmative defenses to a claim for overtime or minimum wage violations, which the employer must prove in order to defeat the claim. ***E.g.***, *Holbeck v. Stevi-West* (1989), 240 Mont. 121, 783 P.2d 391, 394-95. Thus, if Lewis had properly presented a minimum wage or overtime claim, the corporation would have had the burden to establish the domestic service exclusion. However, the hearing officer cannot reach a claim as to which the corporation had no timely notice. Imposing a liability against which the corporation had no opportunity to defend would violate the most fundamental requirements of due process. The Montana Administrative Procedure Act requires notice of the issues involved in a case. ***See***, ***e.g.***, Mont. Code Ann. §§ 2-4-601(1). This is analogous to notice pleading in court cases–the parties can refine and more particularly identify the issues during the prehearing procedures.

Lewis' complaint form did not identify her wage claims as minimum wage or overtime claims. The department "Determination" (December 29, 2004) likewise did not identify the claims as minimum wage or overtime, and imposed a 55% statutory penalty, reduced to 15% if the corporation paid the wages found due and the penalty within the time specified. This is the appropriate penalty for wages awarded on claims other than overtime or minimum wage claims. Admin. R. Mont. 24.16.7551. For overtime and minimum wage violation claims, the smallest possible penalty permitted by the regulations is 110% of the wages found due, reduced to 55% if paid within the time specified. Admin. R. Mont. 24.16.7561. Thus, neither Lewis' complaint nor the determination gave the corporation notice that claims for minimum wage or overtime violations were involved in this case.

The hearing officer, in his questions to the parties, did not inquire about minimum wage or overtime issues, because Lewis had not made a clear claim involving either in her filings during the pendency of this contested case proceeding. At the end of his questioning of Lewis, when the hearing officer invited her to present any additional testimony, she still did not present a clear statement of either a minimum wage or overtime claim. By the time she finally did make such a statement,

in passing, on the second day of the hearing, it was far too late for the corporation to marshal documentary and testimonial evidence to establish the affirmative defense.[5] Therefore, the sole issue for this hearing is whether Lewis proved that she was not paid, at the agreed rates, for work she performed.

Lewis bears the burden of proving by a preponderance of the evidence that she earned wages beyond those already paid. *Berry v. KRTV Communications* (1993), 262 Mont. 415, 426, 865 P.2d 1104; ***see,*** *Marias Health Care Serv. v. Turenne*, 2001 MT 127, ¶¶13-14, 305 Mont. 419, 28 P.3d 494 (lower court properly concluded that the plaintiff's wage claim failed because the plaintiff failed to meet her burden of proof to show that she was not compensated in accordance with her employment contract). Lewis presented conflicting and confusing testimony about both the hours she worked and the amounts she was paid.

If the corporation failed, as far as the evidence reflected, to maintain records of the amount of Lewis' work, then Lewis could introduce evidence "to show the amount and extent of that work as a matter of just and reasonable inference." *Lewis v. B & B Pawnbrokers, Inc.* (1998), 292 Mont. 82, 968 P.2d 1145; ***quoting*** *Garsjo v. Dept. of Lab. and Indus.* (1977), 172 Mont. 182, 562 P.2d 473, 476; ***as quoted in*** *Holbeck*, ***op. cit.*** The problem with this basic rule for wage and hour cases is that neither party presented better evidence of amounts earned and amounts received than the time cards and the W-2s. Pay-stubs, checks and the other records provided, with the testimony provided, lacked clarity and explanation that the hearing officer could use to develop cumulative totals of times worked and amounts paid that were more reliable than the time cards and the W-2s.

The only available evidence upon which to establish the amounts earned and the amounts paid, as a matter of just and reasonable inference, were the time cards Lewis provided to the corporation, and the income to Lewis that the corporation reported for tax purposes. Both parties utilized the W-2s in their dealings with the state and federal tax authorities. Although the time cards are difficult to interpret and subject to some doubt, they are still the most reliable records of time worked. Based upon these records, Lewis failed to prove that the corporation owed wages to her for work she had performed, as alleged by her complaint.

The corporation tried to raise another issue–that it should recover from Lewis for overpayments. The department has the power to issue determinations and (when a determination is appealed) final agency decisions after contested case hearings,

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[5] The signatures approving work times reported on the time cards may indicate a "direct employment" relationship between Lewis and the relatives or legal guardians. Lewis' failure timely to assert overtime or minimum wage claims denied the corporation a chance to address this issue.

deciding in both instances the amounts due, if any, and imposing penalties when wages are due and owing. Mont. Code Ann. § 39-3-201 ***et seq.*** These statutes do not empower the department to award to the employer any wages overpaid. Thus, with the adjudication that Lewis did not prove wages due and owing, the department has exhausted its statutory powers.

V. CONCLUSIONS OF LAW

1. The State and the Commissioner of the Montana Department of Labor and Industry have jurisdiction over this complaint. Mont. Code Ann. § 39-3-201 ***et seq.***; *State v. Holman Aviation* (1978), 176 Mont. 31, 575 P.2d 925.

2. The Kensington Agency, Inc., does not owe Theresa M. Lewis any unpaid wages for work she performed.

VI. ORDER

The Kensington Agency, Inc., does not owe Theresa M. Lewis any wages or penalty, and this claim is DISMISSED.

DATED this 26th day of July, 2005.

DEPARTMENT OF LABOR & INDUSTRY
HEARINGS BUREAU

By: /s/ TERRY SPEAR
Terry Spear
Hearing Officer

NOTICE: You are entitled to judicial review of this final agency decision in accordance with Mont. Code Ann. § 39-3-216(4), by filing a petition for judicial review in an appropriate district court within 30 days of service of the decision. See also Mont. Code Ann. § 2-4-702.

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CERTIFICATE OF MAILING

The undersigned hereby certifies that true and correct copies of the foregoing document were, this day, served upon the parties or their attorneys of record by depositing them in the U.S. Mail, postage prepaid, and addressed as follows:

THERESA LEWIS
PO BOX 613
CORVALLIS MT 59828

DEAYDRE PULLIAM
THE KENSINGTON AGENCY INC
809 S 1ST ST
HAMILTON MT 59807

DATED this 26th day of July, 2005.

/s/ SANDRA K. PAGE
Legal Secretary